My own interpretation as to what constitute disputed facts generally are as follows. If a person aggrieved by the decision of the District Officer is desirous of setting it aside based on the same arguments pleaded before the Settlement Officer or the District Officer then he has to do so by way of appeal under section 16(2) of the Ordinance. If however the aggrieved person is seeking to establish a superior title under section 10 then he has to file a fresh suit within a period of 3 years after the date of possessory title being registered in the name of the other party. In the suit the aggrieved party should not merely seek to set aside the order of the District Officer but to bring in other facts which may not be before the District Officer in order to establish his proprietory right, for instance, a sale agreement or trust and pleading fraud, misrepresentation, limitation, indefeasibility of title, etc. quite independent of the facts on possession as before the Land Office. The aggrieved party may even admit the correctness of the order by the District Officer as to the possession. There must be privity between the parties. The plaintiff must have the capacity to sue and the defendant be sued. If any party before the District Officer has no capacity, then any other person having such capacity should be joined as a defendant. Deceased person should be sued or be sued by his administrator and it is expected that within the 3 years granted it is sufficient to take out letters of administration.

Take a hypothetical case where a person is squatting on a land registered in the name of another. He may be granted possessory title under section 8(1) of the Ordinance notwithstanding that that person is having adverse possession inconsistent with section 341 of the National Land Code where it provides that adverse possession will not extinguish the title of the proprietor. Thus, if the squatter is granted possessory title then the proprietor is at liberty to bring a suit to establish his right as a proprietor under section 10 of the Ordinance pleading that the defendant is squatting on his land and that he has no legal right to the land provided he files the suit within the statutory period.

There is another aspect of the law which, I am of the opinion, is having quite a significant effect on the decision as to whether an aggrieved person should appeal or should file a suit. It would appear to me that the Collector and District Officer has under section 5(1) of the Ordinance powers to ascertain the following:

(a) who is in possession of the land;

(b) who is the registered proprietor;

(c) who is entitled to be registered as proprietor;

(d) whether any person has a registrable interest in any particular piece of land and the extent of such interest.

Thus, it would appear the Collector and District Officer has all the powers at an enquiry just for the purpose of *ascertaining*. But he cannot order specific performance which can only be exercisable by the High Court. What he can under the Ordinance if:

(a) he finds a proprietor in possession then he will make an order to that effect and in this instance he does not give an order for possessory title but absolute title under section 7 of the Ordinance;

(b) he finds any person other than the proprietor is in possession otherwise than holding under the proprietor, then he gives an order for possessory title under section 8 of the Ordinance.

Therefore, the proper step to be taken by an aggrieved person will be that he could only appeal if the District Officer orders absolute title under section 7 of the Ordinance and in this instance he cannot bring a suit under section 10 because section 10 gives the right to the aggrieved person to file a suit if only there is a possessory title. However, if the District Officer were to give an order for possessory title, a proprietor or a person entitled to be a registered proprietor will have a choice of whether to appeal or to file a fresh suit dependent on whichever method he thinks he has a greater chance of succeeding. A person in possession who may not be the proprietor or entitled to be registered as proprietor can only appeal for possessory title and he cannot file a suit as he cannot assert his superior title. All in all, whether an aggrieved party can appeal or file a suit depends on the order of the District Officer and that party's own interests in the land.

After having disposed of the above, I am of the opinion, the instant case before me is not the assertion of a superior title by the plaintiff. It is a claim for setting aside the order of the District Officer for being *ultra vires* against which order the plaintiff should have appealed.

In the circumstances, I strike out the plaintiff's claim with costs. I would add that the District Officer should not in the first place have been joined as a defendant by the plaintiff.

Claim struck out.

Solicitors: *C. Jegathesan & Co.; Yusof & Co.*

CHANG FAH LIN v. UNITED ENGINEERS (M) SDN. BHD. & ORS.

[O.C.J. (Abdul Hamid J.) January 21, 1976, June 6, 8 and September 12, 1977]

[Kuala Lumpur — Civil Suit No. 750 of 1971]

Labour Law — Employee injured in the course of work — Negligence — Failure to provide safe system of work — Implied contractual duty — Common law duty of care owed to employee — Master and servant relationship — Principles for determining — Direction and control of work, payment of wages.

Employment — Master and servant relationship — Independent contractor — Joint duty owed by several occupiers, controlling and supervising manner of work — Common law duty of care — Invitor/invitee relationship.

Torts — Invitor/invitee relationship — Duty of occupier to workmen lawfully on site and engaged in work.

Damages — Fractures of vertebrae, femur and transection of spinal cord — Incomplete paralysis of upper limbs and total paralysis of lower limbs.

On the day of the accident, the plaintiff was in the process of fixing zinc sheets on the roof at a height of twenty five feet from the ground when he slipped and fell down sustaining severe injuries. No safety belts were used because none was provided. The plaintiff was 28 years old at the time of the accident and he was earning between $300 to 350 monthly. As a result of the said accident, he sustained fractures of two

vertebrae with transection of the cervical spinal cord and a fracture of the femur. He suffered incomplete paralysis of the upper limbs and total paralysis of the lower limbs. The plaintiff claimed for damages caused by the negligence and/or breach of statutory duty of the first, second and third defendants or any of them.

The plaintiff was one of the labourers working at the site where a factory was being constructed for a company, E. Ltd. undertaken by the first defendant. A contract in writing was entered into between the first defendant and the second defendant covering the erection of all steel work including roofing and painting. The contract included the supply of all labour and lifting equipment necessary to complete the work. The plaintiff alleged that at all material times the defendants were engaged in the construction of the factory and it was the duty of either or all of the defendants to provide a safe and proper system of work.

The first defendant contended, *inter alia*, that by the contract in writing the second defendant became an independent contractor over whose actions the first defendant had no control. The first defendant alleged that at some date unknown to them, the second defendant had unlawfully sub-contracted the work under the contract to the third defendant. The first defendant submitted that if there was negligence or breach of duty of employment which caused the injuries, the plaintiff's remedy lay with the third or second defendants.

The second defendant contended that the plaintiff was the employee of the first or third defendant. The third defendant on the other hand, admitted that he was a headman of a gang of labourers engaged in the construction work under the supervision of the first defendant. He alleged that he supplied the plaintiff at the request of the first defendant and/or second defendant and the plaintiff was at all material times the employee of the first or second defendant.

Held, allowing the plaintiff's claim: (1) it was not for the plaintiff to establish precisely in whose employment he was. It was sufficient if there was some evidence to show that he was engaged to carry out the work by one of the defendants and that the accident did happen in the course of his work;

(2) there was the relationship of master and servant, and common law duty of care owed by the first, second and third defendants towards the plaintiff;

(3) both the second and third defendants were jointly responsible for the control and direction of the works to be executed by the workers. As between the second and third defendants with the plaintiff there existed the relationship of employer and employee. As such, they owed a duty of care to the plaintiffs;

(4) the first defendant did have the overall possession, occupation and control of the whole site and by reason of their position they owed a duty towards workmen lawfully on the site and engaged in the construction work;

(5) there was an implied contractual duty on the part of the first defendant to provide and supply the safety equipment which included a duty to take reasonable steps to see that they were supplied;

(6) liability amongst all the defendants towards the plaintiff should be apportioned as follows: first defendant 40%, second defendant 40% and third defendant 20%;

(7) the plaintiff was entitled to $93,000, general damages and $28,800 special damages.

Cases referred to:-

(1) *Aikbee Sawmill Ltd.* v. *Mun Kum Chow* [1971] M.L.J. 81.

(2) *Donovan* v. *Leing Wharton & Down Construction Syndicate* [1893] 1 Q.B. 629.

(3) *Mersey Docks and Harbour Board* v. *Coggins and Griffiths, Ltd. & McFarlane* [1946] 2 All E.R. 345.

(4) *Wheat* v. *E. Lacon Co. Ltd.* [1966] 1 All E.R. 582.

(5) *Glasgow Corporation* v. *Muir & Ors.* [1943] A.C. 448.

(6) *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee* [1970] 2 M.L.J. 151.

(7) *Mun Kum Chow* v. *Aikbee Sawmill Ltd* (unreported), *Dass* on Quantum p. 422.

CIVIL SUIT.

G. Tara Singh Sidhu for the plaintiff.

M. Shankar for the first defendant.

Chew Siew Yoke (Miss) (with *Chan Mo Lin (Miss)*) and *Morris Edgar* for the second defendant.

Joginder Singh for the third defendant.

Abdul Hamid J.: The plaintiff's claim is for damages and loss suffered by him caused by the negligence and/or breach of statutory duty of the first, second and third defendants or any of them. The plaintiff Chang Fah Lin was one of the labourers working at the site where a factory was being constructed for the Eastern Oil Palm Limited at Ulu Tiram undertaken by United Engineers (M) Berhad the first defendant. A contract in writing was entered into between the first defendant and Kwan Hup Chee the second defendant covering the erection of all steel work including roofing and painting. The contract included the supply of all labour and lifting equipment necessary to complete the work. The plaintiff alleged that at all material times all the defendants were engaged in the construction of the factory and that he was employed as a labourer of either or all the defendants. The plaintiff also alleged that it was the duty of either or all the defendants alternatively it was a term of the contract of employment to take precautions for his safety while he was engaged upon the construction work, not to expose him to risk of damage or injury of which they know or ought to have known, to provide and maintain adequate and suitable plant to enable him to carry out the said work in safety and to provide a safe and proper system of work.

It is not in dispute that in the course of fixing aluminium sheets on the roof of the said factory, the plaintiff fell to the ground and sustained severe injuries.

It is the first defendant's contention that by the contract in writing the second defendant became an independent contractor over whose actions the first defendant had no control. It is also their contention that in the event of the second defendant assigning or sub-letting the contract or any part of it without licence, they could terminate the contract for default and take the work out of the second defendant's hands and may proceed to recover from the second defendant as regards antecedent breaches or losses, damages and costs they may sustain in consequence thereof. The first defendant accept responsibility in regard to medical attention and hospital fees for the second defendant's workmen. It is alleged that at some date unknown to them, the second defendant, without licence, authority or permission, unlawfully sub-contracted the work under the contract to the third defendant.

It is the further contention of the first defendant that —

(a) the plaintiff was the servant of the third defendant and answerable to the third defendant;

(b) the first defendant owed no duty of care to the plaintiff and had no contractual relation with him;

(c) the plaintiff was not employed by the first defendant and the first defendant had no knowledge of duties imposed upon them by the third defendant;

(d) there was no negligence or breach of duty or breach of the terms of any contract of employment on the part of the first defendant with the plaintiff and there was no relevancy or application of the doctrine of *res ipsa loquitur;* and

(e) if there was negligence, breach of duty or breach of the terms of the contract of employment which caused or resulted in the injuries, the plaintiff's remedy lies against the third or second defendant.

The second defendant has admitted that he supplied the labour to the first defendant to fabricate and paint the constructional steel work at the factory under the direction and supervision of the first defendant under the contract but denied that the plaintiff was employed as his labourer. At all material times the plaintiff was an employee of the third defendant and/or the first defendant.

It is contended that the first defendant were entirely responsible for the provision of all safety measure appliances and equipment to ensure safety of all workers including the plaintiff while they were engaged as labourers for the construction of the factory. It is also contended that the plaintiff's accident was caused wholly by the negligence, breach of duty or breach of the terms of the contract of employment on the part of either the first or the third defendant and reliance would be placed in so far as it may be necessary, on the doctrine of *res ipsa loquitur* to prove such negligence.

Alternatively it is the second defendant's contention that by Clause 8 of the contract the first defendant had expressly or impliedly accepted full responsibility and/or liability for all workmen, the plaintiff was one, while so engaged in the carrying out of the work at the factory.

The third defendant has alleged that he was a kepala or headman of a gang of labourers engaged in the construction work under the direction and supervision of the first defendant. He has also alleged that he supplied the plaintiff at the request of the first defendant and/or second defendant as the plaintiff was required to fix aluminium sheets on the roof of the factory. The plaintiff, he said, was at all material times the employee of the first defendant or second defendant.

The third defendant further alleged that —

(a) the first defendant were wholly responsible for the safety, in particular, the supply of all safety appliances to all workers including the plaintiff;

(b) the accident whereby the plaintiff was injured was caused by reason of the negligence and/or breach of the terms of the employment on the part of the first defendant and/or the second defendant;

(c) by Clause 8 of the contract made between the first and second defendants, the first defendant expressly or by implication accepted full responsibility and/or liability for injury to all workers working at the factory site; and

(d) the first defendant and/or the second defendant expressly or impliedly undertook to hold the third defendant harmless and to keep him indemnified against all loss, expenses and damage in respect of any injury to the plaintiff.

The plaintiff adduced evidence to show that the accident happened on June 28, 1969 at the factory which was being built by the first defendant at Ulu Tiram. Up to the time of the accident the plaintiff had worked for nine days. His work was to make holes on zinc sheets and affix the sheets with screws. He was working on the roof at a height of 25 feet from the ground. Work started before 9.00 a.m. On this day he was making holes with an electric drill standing on the zinc roof. He slipped and fell down. The zinc roof was wet.

It is revealed that there was no scaffolding for the plaintiff to stand on while working and nothing for him to hold on to and no safety belt was used. It is also revealed that all appliances for working were supplied and they were available at the store. There was, however, no safety belt. The plaintiff identified the third defendant as the kepala and he stated the third defendant called them to work for the first and second defendants. The third defendant told him what the wages were and of the allowances, overtime and boarding. The plaintiff said that the first defendant were to pay for these.

Under cross-examination the plaintiff stated that he had five or six years' experience in fixing roofs. He made no complaint to the third defendant that he was not provided with safety belts but did ask the third defendant about them a few days before the accident but was told that they were not provided. The other workers also asked for the safety belts. He alleged that all of them thought it was dangerous to work on the roof without safety belts. The plaintiff denied that he had himself decided the precaution he should take.

Describing the accident the plaintiff conceded that when he got up to the roof it was wet and that if it had been dry, he might not have slipped. He could have wiped the area first but time would have been wasted. The plaintiff denied that he had not yet started work when he fell. He admitted he could not remember exactly how he lost his footing but he remembered that it was while boring holes using an electric drill when he slipped and fell down. He was positive that he did not trip over a cable.

In answer to a question put by the court the plaintiff said that the kepala Soo Yoon engaged them to work for Kwan Hup Chee for the roof of United Engineers.

One of the plaintiff's co-workers Wong Siew Kong testified that it was when they were working together that the plaintiff fell. Safety belts were not provided up to that time. It was a week after the accident that he was supplied with them. He said that the third defendant had told him he got them from United Engineers. Wong Siew Kong also testified that he was paid by the third defendant who told him that he (third defendant) was working for Kwan Hup Chee and had to look for workmen to do the construction work.

Mr. Eric Douglas Reid, Manager of Palm Oil Division of the first defendant testified that AB8 was

the contract between the first defendant and Kwan Hup Chee. The contract included the supply of labour and lifting equipment necessary to complete the work. The second defendant controlled the way the work was to be done, decided the persons to be engaged for the work and the wages to be paid. The contract was subject to certain conditions e.g. prohibition of assignment except medical attention and hospital fees.

Mr. Reid stated that after the accident a report was sent to the Commissioner for Labour giving details of the accident. It was stated in the report that the plaintiff was employed by the second defendant from Soo Yoon Iron Works, an outside firm. He also stated that he did not know that the second defendant had sub-contracted to Soo Yoon.

Under cross-examination by Miss Chew for the second defendant Mr. Reid said that first defendant did not control the way the work was to be done at the Ulu Tiram project. As far as the first defendant were concerned full instructions were given to the second defendant except that the first defendant would see that the contract work was done according to specifications after the completion of the job. When Mr. Reid's attention was drawn to Clause 8 concerning the 1% deduction, he said that he was not aware of it. His attention was also drawn to a contract the first defendant had with Kwan Hup Chee in regard to Gomali Oil Steel Frame structure and some other contracts. To my mind they are not really relevant to the determination of the issue before the court.

Cross-examined by Mr. Joginder Singh for the third defendant Mr. Reid stated that the first defendant took possession of the site to start work and they were responsible for the factory at Ulu Tiram. Mr. Reid also stated that he was not aware the third defendant was called to the first defendant's premises and requested to look for workers to lay roof sheets. He was also unaware that the third defendant had to go to Kuala Lumpur to get instructions from the first defendant's staff.

Mr. Reid disagreed that the first defendant had overlooked to provide safety devices. He, however, said that safety devices were available at the first defendant's premises to sub-contractors as and when necessary. He disputed that safety devices were only provided after the accident at Ulu Tiram. However, he was not aware of any circular to the effect that safety devices were available nor was he aware of any written document that the workers must use safety devices. When a question was put to Mr. Reid that the first defendant in fact did not provide safety devices to the second defendant or his workers at Ulu Tiram, his answer was that he was not aware of it.

Cross-examined by Mr. Tara Singh Sidhu Mr. Reid said that safety equipment were available before the accident and the first defendant made them available for this project. He, however, disagreed that the first defendant was responsible for the safety of the workers. He agreed that the first defendant were to supply all safety equipment for the workers. He also agreed that the safety equipment could have been sent to the site or the sub-contractor could have taken the safety equipment before leaving Kuala Lumpur. He further agreed that it would have been prudent for the first defendant to send the safety equipment. He conceded that the safety belts were necessary.

Mr. Reid said that he was aware the contract was sub-let to Soo Yoon after some time. In the light of NAB34 Mr. Reid agreed that Kwan Hup Chee had sub-contractors and the position was accepted by the first defendant.

When Mr. Reid was re-examined he stated that prior to 1969 he had not read anything concerning safety belts. However, looking at NAB31 he said that this refers to standing instruction and he was aware of it even before the accident even though he had not read the circular. Asked whether it was prudent for United Engineers to send safety equipment to Ulu Tiram Mr. Reid explained that the third defendant could have got them from the first defendant when leaving Kuala Lumpur. They would have known the nature of the job in Ulu Tiram and Kwan Hup Chee should have known of the standing instruction.

The first defendant also adduced evidence from one Chan Kim Chye an advocate and solicitor who stated that he received a letter (D3) from the plaintiff's solicitors. It was a claim by the plaintiff against the first defendant. A reply (D4) denying liability was sent. He also stated that he investigated the relationship of the parties concerned. Mr. Chan produced a statutory declaration (NAB7) affirmed by the third defendant on October 20, 1970, sixteen months after the accident. According to Mr. Chan he took a statement from Kwan Hup Chee (NAB8) and also recorded a statement from Soo Yoon (NAB10). Both Miss Chew and Mr. Joginder Singh objected to the statements being admitted on the grounds that they are solicitor and client privileged documents. The court saw no reason to reject these documents and accordingly admitted them.

In the statement Kwan Hup Chee alleged that he orally sub-contracted the entire work sub-contracted to him by the first defendant to Soo Yoon. Soo Yoon was to supply labour and be responsible for the erection of the building. However, he stated that he directed the work of Soo Yoon but the control of his labourers remained with Soo Yoon and he did not hire the labourers.

Soo Yoon's statement was to the effect that he got the sub-contract work from Kwan Hup Chee for steel erection and roofing. It was an oral agreement. The materials were supplied by the first defendant and he supplied labour and the hiring was done by him. He was responsible for the execution and direction of the work and Kwan Hup Chee had no control over his workers.

Kwan Hup Chee's testimony may be briefly summarised as follows —

He joined the first defendant in 1949 and broke off the association in 1972. As regards the contract he said that he started work after the contract was signed. He sent tools, equipment and workmen. The workmen were the workmen of sub-contractor Soo Yoon.

He also said that Soo Yoon was the only one who supervised. The first defendant did not supervise but could control the manner of work to be carried out. He also alleged that it was the work of the first defendant to control but the workmen did not listen to the instructions of the first defendant. In the course of his testimony Kwan Hup Chee somewhat altered his statement when he said that if the first defendant were dissatisfied with any worker then they should make a complaint to him and he would refer the complaint to Soo Yoon. Nevertheless he went on to say that the first defendant can stop Soo Yoon's labourers if they do something wrong.

Speaking of safety of the workers at the construction site Kwan Hup Chee said that he disagreed with what Mr. Reid said that the first defendant were not responsible for the safety of the workers. The first defendant were the main contractor providing materials and implements and they have not said that they were not responsible for providing the safety equipment.

He contended that the visits he made to the site were to inspect the work to find out up to what stage they had done the work. The first defendant also inspected the work.

Cross-examined by Mr. Shankar, Kwan Hup Chee said that the first defendant did not inform him that he had to provide for the safety of the workers before the accident. Kwan Hup Chee also said that the workmen did not use the safety devices because there was no one to supervise them. He agreed that he himself did not tell Soo Yoon to tell his workmen to put on safety devices. He further said that during that time he was not provided with safety devices.

Kwan Hup Chee denied that there was standing instruction before this. He maintained that the first time it was issued was on August 21, 1970.

Cross-examined by Mr. Joginder Singh Kwan Hup Chee stated that his contract with the first defendant was only part of the contract for a sum of $14,199 against the whole contract value of $172,000. The concrete foundation, the concrete floor and drain of the factory were done by the first defendant. The part done by the first defendant was the civil engineering work. At the same time electrical work had to be done. Kwan Hup Chee also stated that work going on at the site was under the first defendant and he was only concerned with the structure.

The store at the site where tools for building the factory were kept belonged to the first defendant. The tools were supplied by the first defendant. Safety devices were nowhere to be found and the first defendant did not use safety devices before the accident. No safety devices were given to him except once ten years before the accident for the construction of wireless stations.

Kwan Hup Chee was aware of the danger of workmen falling and conceded that he did not provide safety devices. He contended that Soo Yoon had not told him that the workers wanted safety devices.

Kwan Hup Chee alleged that the first defendant should provide the safety devices for the work. He denied that Soo Yoon saw him and he asked Soo Yoon to see Mr. McMahon of United Engineers. The evidence reveals that only after the accident Kwan Hup Chee and Soo Yoon went to see an engineer at United Engineers for safety belts.

Speaking of Soo Yoon he denied that he was his kepala. He maintained that there was an oral contract to erect girders and laying of roof. Kwan Hup Chee, however, stated that United Engineers could dismiss any of his workers and he could dismiss any of the workers and United Engineers could tell the workers through Soo Yoon to do the work.

The second defendant called Peter Kor as his witness. Peter Kor was at the material time employed by the first defendant as a mechanical engineer. He testified that the sub-contract the first defendant had with Kwan Hup Chee was sub-let by Kwan Hup Chee to Soo Yoon. He added that it was common knowledge most of the works were sub-let by Kwan Hup Chee.

Under cross-examination Peter Kor affirmatively stated that before the accident safety devices were not provided. They were only provided after the accident. As for the Ulu Tiram factory the first defendant had overall control. It was usual to have a clerk of works. There was, however, no supervisor provided by the first defendant. Peter Kor also stated that the first defendant was doing the civil engineering work when roofing was being laid.

The last to testify was Soo Yoon. He said that in 1969 he was a labourer and his work was to construct or erect steel frames. By June 1969 he had been with Kwan Hup Chee for about one and a half years. He contended that Kwan Hup Chee was his employer. His job as kepala was to look for workmen and to supervise them. He also contended that he received payment fortnightly and he then paid the workers. He said he did not know the entire work was sub-contracted to him. Soo Yoon firmly denied that safety devices were provided. He alleged that a few days after his work started some workers had asked for safety belts. He saw Kwan Hup Chee who went to see some Europeans. Kwan Hup Chee came back and told him there were no safety belts.

Cross-examined by Mr. Shankar, Soo Yoon said that there were ten to twenty workmen working together with him at Ulu Tiram. He looked for the workmen, paid their wages and all the labourers received their wages from him. Soo Yoon said he signed the statement for fear of losing his job. The statement was explained to him by one Kwok Mun Fong of United Engineers.

When Soo Yoon was cross-examined by Mr. Morris Edgar he was shown a number of cheques to prove that various payments were made to him by Kwan Hup Chee. He contended that he collected the money for Kwan Hup Chee from the bank and gave the money back to him. He admitted some cheques were for payment of wages.

Cross-examined by Mr. Tara Singh Sidhu Soo Yoon said that the cheques were for wages. They were cashed by him. Kwan Hup Chee had more than a hundred workers and all wages were paid by him.

I have very briefly set out the substance of the evidence produced before the court. Upon such evidence I shall proceed to determine some of the questions of fact. Before I do so may I observe that the facts constituting the plaintiff's case are not really in dispute. It is established that on the day the plaintiff was in the process of fixing zinc sheets on the roof at a height of approximately twenty five feet from the ground when he slipped and fell down sustaining severe injuries. No safety belts were used because none was provided. There was no evidence whatever to show that the plaintiff himself was in any way to blame for the accident although the defence made an attempt to show that the roof was wet and therefore the plaintiff ought to have wiped it dry before commencing work. The defendants are not disputing that it was dangerous for a worker to work at that height without provision of some sort of safety equipment or taking some safety measures to protect the workers from falling down. The fundamental question that seems to be in issue is the employment of the plaintiff. The answer to this question will lead to a finding of the liability between the defendants. However, I do not think it is for the plaintiff to establish precisely in whose employment he was. Suffice if there is some evidence to show that he was engaged to carry out the work by one of the defendants and that the accident did happen in the course of his carrying out the work he was engaged to do.

Turning now to the question of employment it has been urged upon me for the first defendant that the plaintiff was not from any point of view the servant or employee of the first defendant and therefore the first defendant owed no duty to him. It is submitted that the third defendant was liable towards the plaintiff. Mr. Morris Edgar counsel for the second defendant also urged the court to hold that only the third defendant was liable to the plaintiff. On the other hand, Mr. Joginder Singh counsel for the third defendant has urged upon me to consider the relationship of the third and second defendants to determine whether the plaintiff was the employee of the third or the second defendant. He drew my attention to the testimony given by the plaintiff to the effect that he was engaged by the third defendant to work for the second defendant. I am inclined to think that it is necessary to have a close and critical examination of the relationship of the third and the second defendants. As between the first and the second defendants there seems to be no dispute that the first defendant sub-contracted the works to the second defendant. As between the second and the third defendants, however, there is a dispute whether the second defendant had sub-let the works to the third defendant.

On the evidence before the court it is evident that there was some arrangement between the second and third defendants in regard to the works to be executed. This arrangement seemed to have taken the form of an undertaking by the third defendant to supply the workers for purposes of erecting the steel frames and laying the roof. However, there was no prior agreement as to who would assume responsibility for controlling and supervising the manner the works were to be carried out. It was, conceivably, a somewhat loose arrangement between them that while the third defendant was responsible for supplying the workers for purposes of carrying out the works, the second defendant was to continue having the authority to control and direct the works to be done. Two statements accompanied by two statutory declarations were produced before the court to prove that the second defendant had sub-let the works to the third defendant. I do not doubt that the statements were signed by the makers but the circumstances surrounding the making of the statement by the third defendant has but given rise to some strong suspicion that the first and second defendants had made every effort to show that the third defendant was solely liable to the plaintiff. The statements were recorded by Mr. Chan Kim Chye an advocate and solicitor acting for the first defendant. Mr. Chan said that he investigated a claim by the plaintiff and also the relationship of the parties concerned. In the course of the investigation he recorded the statements from both the second and the third defendants. He admitted that he was acting in the interest of the first defendant and not the second or third defendant. When the admission of these statements as exhibits was objected to, I ruled that they were admissible. I failed to see why they should not be admitted. But what weight shall be attached to these statements is, however, for the court to consider. As for the second defendant it is revealed that he was working for the first defendant and, not unnaturally, he was somewhat dependent upon the first defendant. It is also revealed that the second defendant's father was previously working for the first defendant. Hence it was not in his interest to say anything that would jeopardize his position as the first defendant's sub-contractor, and incidentally, it would serve his interest to blame the third defendant. The third defendant has not denied putting his signature to the document but has alleged that before this was done the second defendant saw him on a number of occasions and told him that if he did not sign he would be dismissed. The third defendant has had no English education and it is not improbable that he made the statement after pressure had been brought to bear upon him. In the circumstances I feel it is not safe to rely upon it, indeed very little weight should be attached to the third defendant's statement.

In my view consideration must primarily be given to the oral testimony and other documentary evidence produced before the court. I have scrutinized the evidence very carefully and I find that sufficient evidence exists for the court to hold that the third defendant was not an independent contractor in the sense that he had authority to control and direct the works. It is established that the works the first defendant sub-contracted to the second defendant were only a portion of the whole construction works. Nevertheless it must be borne in mind that the second defendant was in fact a sub-contractor working for the first defendant. It must also be borne in mind that the second defendant was responsible, to use the words of Mr. Reid, for controlling the way the work was to be done. On the evidence and in the absence of any clear agreement between the second and the third defendants, I am inclined to hold that despite the arrangement between them, the second defendant was equally responsible for controlling the way the work

was to be done. It is established that the second defendant did make frequent visits to the site not only to supervise but to give directions regarding the works that were being carried out. I accept that pursuant to the arrangement made between the second and the third defendants, it is for the third defendant to supply the workers for purposes of erecting and laying the roof although in all probability he (the third defendant) was responsible for the payment of wages to the workers he had engaged. Nevertheless his role was mainly that of a kepala responsible towards his workers but in so far as the execution of the works both he and the second defendant were jointly responsible. The plaintiff himself stated that he was engaged to work for the second defendant. On the balance of probabilities I find that both the second and the third defendants were jointly responsible for the control and direction of the works to be executed by the workers. In other words, as between the second and the third defendants with the plaintiff there existed this relationship of employer and employee. It is my judgment that both the second and the third defendants owed a duty of care to the plaintiff. The duty owed by the third defendant should not, however, be greater than that owed by the second defendant as there was clearly a further duty on the part of the second defendant to provide the workers with safety equipment. Speaking of relationship of master and servant the following passage in 25 *Halsbury's* Laws of England third edition pages 447/448 seems to throw some light upon the characteristics of such relationship—

"Whether or not, in any given case, the relationship of master and servant exists is a question of fact; but in general the relationship imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done. A person may be the servant of another although a third party has the power of appointing or dismissing him or of requiring his dismissal, or has powers of direction and control in regard to his work, or pays him his wages. A person may be a servant although remunerated otherwise than by wages, or although only employed at will; and the relation is not destroyed because the master works with the servant. A person may be a servant to different masters; and a contract for exclusive personal service does not necessarily establish the relation of master and servant.

A servant of a sub-contractor is not, *prima facie*, the servant of the main contractor, though a servant of one employer may become the servant of another *pro hac vice* where services are lent." (See also same volume of *Halsbury's* pages 501, 502 and 503).

It now remains for the court to consider the position of the first defendant. Evidence clearly shows that the first defendant were responsible for the tools and equipment and materials needed for purposes of the construction. The question is whether they also had to provide and supply the safety equipment. Although specific works were sub-contracted to the second defendant I am inclined to hold that the first defendant had impliedly undertaken to supply the safety devices. I do not think there is merit in Mr. Shankar's submission that the third defendant was responsible for their supply. The evidence of Peter Kor, Reid and Kwan Hup Chee has left the court with no doubt whatever that the first defendant were responsible to supply the safety equipment. Kwan Hup Chee stated that the first defendant were the principal contractor. It was the first defendant who supplied all the tools and equipment and the materials and the first defendant did not inform him that he had to provide the safety equipment and he was not provided with safety devices. Mr. Peter Kor testified to the effect that before the accident safety devices were not provided but the first defendant did provide them after the accident. He added that the first defendant had the overall control of the Ulu Tiram factory. He further said that at the same time the first defendant were doing the civil engineering works when the roofing was being laid. The evidence also reveals that after the accident a standing instruction was issued by the first defendant to the effect that all erection personnel working at a height of more than ten feet should have safety harness. Although the instruction had placed the responsibility upon the site foreman to ensure that the instruction would be carried out, it is clearly established from paragraph three of the instruction that the first defendant had assumed the responsibility to supply the safety equipment. (See NAB33). In the circumstances it seems clear that safety devices were not available before the accident and the first defendant had failed to provide and/or supply them.

The first defendant's contractual obligations to provide and supply the safety equipment cannot be said to have been relieved by any subsequent arrangement between the second and the third defendants. As between the second and the third defendants it was clearly the duty of the second defendant, having full knowledge of the first defendant's obligation to provide and supply the safety equipment, to see that the equipment were provided and supplied. As I had observed earlier safety belts had not been made available until after the accident. Mr. Reid's testimony that he was aware of the standing instruction regarding safety equipment prior to the accident cannot possibly be true as no instruction seemed to have been issued prior to 1970. Although the first defendant seemed to contend that they were not responsible to provide and/or supply the safety equipment, Mr. Reid had, however, categorically stated that the safety devices were available to the sub-contractor as and when necessary. They were available at the office in Kuala Lumpur. If indeed the first defendant were able to make available the safety equipment such as the safety belts, I see no reason whatever why the first defendant should not make them available at the site. It is contended that the safety equipment could be collected from the first defendant's office in Kuala Lumpur. To my mind, it is absurd to expect the equipment, even assuming they were available, to be kept in Kuala Lumpur for a job in Johor. In any event it is clearly established, to use the words of Mr. Peter Kor who was at the material time employed by the first defendant, that before the accident the safety devices were not provided. The first defendant did, however, provide them after the accident.

In consideration I find that the implied contractual duty assumed by the first defendant to provide and supply the safety equipment must necessarily be construed to include a duty to take reasonable steps to see that they were supplied. In the event of a breach of that duty the first defendant must accept a share of the blame towards the plaintiff.

The time has come for me to examine very briefly the law in regard to the duty of care. As between the second and the third defendants and the plaintiff there was in the light of my findings of fact that there was the relationship of master and servant, that common law duty of care owed by the first, second and third defendants towards the plaintiff. (See 25 *Halsbury's* 3rd edition page 505). In particular they are "to take reasonable care the safety of his work-people in all the circumstances of the case so as not to expose them to an unnecessary risk." (25 *Halsbury's* 3rd edition pages 508/509). In the instant case I have held that there was clearly a breach of that duty on the part of both the second and third defendants towards the plaintiff. (See also *Aikbee Sawmill Ltd.* v. *Mun Kum Chow*[1]). In view of my finding of fact that both retained control over the plaintiff in regard to the manner the work was to be carried out this case is therefore distinguishable from the case of *Donovon* v. *Leing Wharton & Down Construction Syndicate*[2] cited by Encik Joginder Singh. With reference to the case of *Mersey Harbour Board* v. *Coggins*[3] in so far as it relates to liability towards the crane driver it may perhaps be useful to bear in mind that "the question of liability was not to be determined by any agreement between the general employers and the hirers, but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver."

Although the facts of the instant case are not quite similar to the facts in *Mersey Harbour Board* v. *Coggins, supra,* it is to be observed that my findings of fact in regard to the control and direction of the works to be carried out by the plaintiff are also based upon the circumstances surrounding this particular case. Indeed as Lord Macmillan in that case said at page 350 "as all agree, the question in each case turns upon its own circumstances, decisions in other cases are rather illustrative than determinative."

As for the first defendant I have held that on the facts although the plaintiff was the servant of both the second and the third defendants they also owe a duty towards the plaintiff principally on the ground that the first defendant had failed to provide and supply the safety equipment. Encik Joginder Singh sought to show, when he cited the case of *Wheat* v. *E. Lacon Co. Ltd.*[4] and the case of *Glasgow Corp.* v. *Muir & Ors.*,[5] that as between the first defendant and the plaintiff there was an invitor/invitee relationship and therefore the first defendant were bound to take such reasonable care as would avoid the risk of injury to such person as they could reasonably foresee might be injured by failure to exercise such care. There is merit in the proposition and I am disposed to hold that the first defendant were in fact the occupier by reason of the fact that being the principal contractor they had overall charge and control of the whole construction and had possession of the construction site. It is also established that only a small part of the works was sub-contracted to the second defendant. The first defendant clearly had exclusive occupation as well as possession of the construction site and also had the overall responsibility. It is also established that different sub-contracts had been given out for different works and these works were being carried out simultaneously. The first defendant themselves were, at the time when the roof was being laid, doing the civil engineering works. This fact was not denied and I do not really think it can be seriously disputed that the first defendant did have the overall possession, occupation and control of the whole site and that by reason of their position they owed a duty towards workmen lawfully on the site and engaged in the construction work. Further facts also establish that the first defendant had assumed obligation in regard to the supply of tools and equipment including safety equipment. Although the first defendant had denied owing this duty towards the plaintiff, I have earlier on set out facts which clearly show that there was an implied contractual duty on the part of the first defendant to provide the safety belts.

For reasons that I have stated it is my considered judgment that there is a joint liability amongst all the defendants towards the plaintiff and it is my further judgment that the liability may reasonably be apportioned thus — first defendant 40%, second defendant 40% and third defendant 20%.

I shall now consider the quantum. It is relevant to note that the plaintiff was 28 years old at the date of the accident. He was earning between $300 and $350 per month. He spent some time in the hospital but discharged himself from the General Hospital against medical advice on November 20, 1969.

Dr. Khaw Joo Hua, Consultant Orthopaedic Surgeon examined the plaintiff on June 17, 1975 and has given his report (Exhibit P1). The doctor stated that —

(a) The patient sustained burst fractures of two vertebrae with transection of the cervical spinal cord and a fracture of the right femur. Both fractures of the vertebrae have healed and the fracture of the right femur has united well.

(b) The cervical cord transection has left the plaintiff with incomplete paralysis of both upper limbs and total paralysis of both lower limbs. In addition the spinal cord transection has also interrupted the nervous pathways responsible for bladder and bowel functions and he is now left with incontinence of urine and faeces.

According to the doctor the discharge against medical advice has certainly contributed significantly to the development of extensive bed sores and their subsequent slow healing. In his opinion the discharge had adversely affected his rehabilitation, training and worsened his bed sores. It is the doctor's finding that today he is completely non-ambulant and could not even sit up. If he had attended physical rehabilitation under proper supervision he can be expected to at least sit up in a wheel chair and could possibly propel himself around with some aid.

Speaking of prospects for future employment the doctor felt that he must be categorically regarded as totally and permanently disabled. Even if he had attended proper and intensive rehabilitation he cannot be expected to recover to such an extent as to be fit to resume work as a labourer.

The doctor concluded by saying that the plaintiff should attend a spinal centre for proper rehabilitation so that his quality of life can be improved.

Mr. Shankar cited two cases when he submitted on the question of quantum. They are *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee*[6] and *Mun Kum Chow* v. *Aikbee Sawmill Ltd.*[7]

These cases seem useful in the determination of the damages to be awarded. In the instant case, however, there are three aspects of the quantum that call for assessment, namely, the special damages, loss of amenities and loss of future earnings.

It is not seriously in dispute that the plaintiff was earning around $10 to $12 per day and based on 25 working days in a month at $12 a day it is worked out to about $300 per month. I would therefore accept this figure as the plaintiff's monthly earning at the time of the accident. Thus in so far as special damages is concerned I would allow based on $300 per month, a straight multiplier of x 12 x 8 = $28,800. And based on the same monthly loss of earning, taking into account that the plaintiff is now 34 years old, it seems reasonable that I allow a purchase of 16 years. I assess loss of future earnings at $39,000. As for the loss of amenities I hardly think *Raja Mokhtar's* case is a good comparison. Nevertheless it is illustrative of the amount the court may be disposed to assess in similar cases. Taking into account the plaintiff's social position in life and having regard to the sum awarded in the case of *Raja Mokhtar*, I am inclined to think that a sum of $60,000 under this head would represent a fair and reasonable compensation.

It only remains for the court to make some deduction against the sum awarded for general damages on account of the discharge against medical advice which the doctor said has significantly contributed to the development of the extensive bed sores and subsequent slow healing. In consideration it seems appropriate that a sum of $5,800 be deducted from the sum of $99,000 leaving a balance of $93,200. Added to the sum of $28,800 special damages the total damages awarded will be $122,000. I therefore enter judgment against the first, the second and the third defendants for a sum of $122,000 in the proportion of 40%, 40% and 20% respectively, and costs. In addition I also allow 3% interest on the special damages with effect from the date of the accident and 6% interest on the general damages with effect from the date of the service of the writ.

As between the defendants I give liberty to apply.

Judgment for the plaintiff.

Solicitors: *Khoo & Sidhu; Shearn Delamore & Co.; Nik Hussain, Ibrahim, Tan & Abdullah; Morris Edgar & Co.; Joginder Singh & Co.*

SOCIETE DES ETAINS DE BAYAS TUDJUH v. WOH HENG MINING KONGSI

[O.C.J. (Abdoolcader J.)
November 28, 1977, April 20 and May 24, 1978]
[Ipoh — Civil Suit No. 315 of 1977]

Practice and Procedure — Summary judgment — Application for — Defence and counterclaim — Triable issues — R.S.C. 1957, O. 14 rr. 1 & 4, O. 54 r. 22A — Moneylenders Ordinance 1951, s. 2.

In this case the plaintiffs claimed payment of the sum of $33,278.41 due on a permit to mine they executed in favour of the defendants over certain mining lands. The defendants counterclaimed for damages and for the return of the sums of $11,750 and $4,504.60 paid by them. The learned Senior Assistant Registrar granted conditional leave to the defendants to defend on their depositing the sum of $21,412.11 in court. The defendants appealed.

Held: (1) the intention of the rules was that the application for summary judgment should be made before a defence had been delivered in ordinary course. However, the plaintiff was not precluded from making it afterwards. In such an event, the onus was on the plaintiff to show why he did not apply sooner;

(2) if a defendant, though he admitted part of the plaintiff's claim, set up a defence to the residue and a counterclaim for a larger amount than the part of the plaintiff's claim admitted, he would be entitled to unconditional leave to defend as to the whole;

(3) Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court, or to make him liable in such a case to be put on terms of paying into court as a condition of leave to defend;

(4) where there was clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to trouble and expense of proving it, but the defendant set up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment on the claim with a stay of execution until the trial of a counterclaim.

Cases referred to:-

(1) *McLardy* v. *Slateum* (1890) 24 Q.B.D. 504.
(2) *Court* v. *Sheen* 7 T.L.R. 556.
(3) *Jacobs* v. *Booth's Distillery Co.* 85 L.T. 262, H.L.
(4) *Sheppards & Co.* v. *Wilkinson & Jarvis* (1889) 6 T.L.R. 13, C.A.
(5) *Fritz* v. *Hobson* (1880) 14 Ch. D. 542, 561.

CIVIL SUIT.

W.S.W. Davidson and *U. Harcharan Singh* for the plaintiffs.

J.R. Devadas for the defendants.

Abdoolcader J.: The plaintiffs instituted these proceedings against the defendants for payment of a monetary claim, as a result of a Permit to Mine they executed in favour of the defendants over certain mining lands, in the aggregate sum of $33,278.41 being (a) a sum of $23,848.11 alleged to be due and owing to them when mining operations ceased on April 30, 1977, (b) $7,480.30 for the supply of electricity to the mine in May, 1977, as a result of the defendants' failure to remove their equipment from the land, (c) $1,500 by way of indemnity in respect of a fine imposed on them for unlawful dumping, and (d) $450 being expenses incurred by them in the removal of some machinery from the mine hole.

The plaintiffs applied for summary judgment for this aggregate sum of $33,278.11 under Order 14 of the Rules of the High Court, 1957, and on November